



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SERGEANT DANIEL DONOVAN

Complainant

v.

SOMERSWORTH POLICE DEPARTMENT

Respondent

CASE NO. P-7050:7

DECISION NO. 91-104

APPEARANCES

Representing Sergeant Daniel Donovan:

Jeanine L. Poole, Esq., Counsel

Representing Somersworth Police Department:

Daniel M. Cappiello, Esq., Counsel

Also appearing:

Sgt. Daniel Donovan
Mrs. Donna Donovan
Chief Patrick Cote
Douglas Elliott, Jr., City Mgr.

BACKGROUND

On or about August 13, 1991, Complainant Daniel Donovan by and through the Somersworth Police Association and its counsel Jeanine L. Poole, Esq., filed improper practice charges (ULP) against the City of Somersworth (employer) alleging violations of RSA 273-A:5 (1) (a), (c) and (h). The employer responded, through counsel, Daniel M. Cappiello, Esq., under postmark of August 28, 1991. The employer's answer also contained a Motion to Dismiss. On September 16, 1991, complainant filed a Motion for Summary Judgment. The case was set for hearing and heard by the Board at its offices in Concord, New Hampshire on December 5, 1991. Both the Motion to Dismiss and the Motion for Summary Judgment were denied at that time and the parties were directed to present their respective cases in their entirety.

The original pleadings by Complainant alleged that he was hired by the employer as a police officer in June of 1975 and that he was promoted to his present position of Sergeant in October of 1982. Until he was transferred to a patrol sergeant position on or about April 1, 1991, he was acting as court liaison officer and was responsible for departmental computer operations and equipment issue. He performed these functions Monday through Friday during the day shift. After departmental reorganization, he was transferred to a patrol sergeant position and now works on a rotating shift. Complainant

alleges the aforesaid transfer occurred as the result of his being a union activist, spokesman, and representative of bargaining unit members at administrative hearings, a practice dating back some twelve years.

The Complaint's allegations and testimony were that Chief of Police Patrick Cote, on or about March 8, 1991, called him into his office and told him he did not like his (Donovan's) representing subordinate members of the department in grievances against management and administrative proceedings. Cote did not, however, order Donovan to cease that practice. Donovan thereafter, on or about March 13, 1991, assisted Officer Art Williams in an appeal before the City Manager. On April 4, 1991, Donovan assisted Patrolman Dean Winter in an appeal before the City Manager. Donovan testified he would not deny giving such help when asked; however, he did not solicit this type of work.

The Officer Williams matter was not resolved satisfactorily to Williams; therefore, he was scheduled for an appeal before the City's Personnel Appeals Board (PAB) on April 16, 1991, when Donovan again assisted. One witness Donovan expected to appear at the request of the employer was Captain Mark Perreault. In checking with Perreault before the hearing, Donovan discovered that Perreault did not intend to attend. Believing Perreault to be an essential witness for Williams, Donovan, in his capacity as a Justice of the Peace issued a subpoena to Perreault along with the necessary fee. Testimony before the Board established that Perreault did not attend or honor the subpoena.

On April 29, 1991, Cote wrote Donovan a letter stating, in part, "Henceforth you shall refrain from using a subpoena or department personnel for administrative hearings. If you fail to comply, it will be considered insubordination and I will institute disciplinary proceedings against you." With that letter, Cote returned the \$30 tendered as a witness fee to Perreault. Donovan subsequently wrote Cote, asking that Cote's letter of April 29, 1991, be rescinded and removed from his personnel file. By letter of May 16, 1991, Cote denied that request. In testimony before the Board, Cote affirmed that the April 29th letter is still in Donovan's file but is not considered a "disciplinary" matter. Meanwhile, departmental reorganization was completed. On or after April 1, 1991, Cote, along with three other sergeants, was assigned as a patrol supervisor on rotating shifts. Donovan still continues to fill in on court liaison duties if the officer (Hebert) newly assigned thereto (not a sergeant) is unavailable.

Prior to the departmental reorganization there were three patrol sergeants plus Donovan, also a sergeant. Cote's testimony showed that topics of departmental reorganization and work schedule modification were discussed in a mandatory departmental meeting as early as January 14, 1991. By February 8, 1991, Cote had sent a memo to City Manager Elliott asking to add another patrol sergeant position without adding "any new personnel" and said "Thinking in terms of morale, physical wellness and better supervision, I can assign a sergeant to each shift, if I had a [fourth] relief sergeant." Cote and Elliott both testified that neither Elliott nor the Council would accept a new or additional sergeant's position. Any change would have to be made within existing resources. Elliott acknowledged the need for sufficient shift supervision and the need to avoid the appearance of a "top heavy" department.

In his testimony, Cote confirmed discussing departmental reorganization with Elliott, the fact that he needed shift supervision, and the number of new, inexperienced officers. Cote claimed to be unaware that Donovan was representing unit employees from his (Cote's) date of hire, May 16, 1988, until March 8, 1991, when he spoke to Donovan about it. Cote considered his letter to Donovan of April 29, 1991, to be a "cease and desist" order necessary for him to be able to control departmental routine, notwithstanding the fact that

the time for which Perreault was subpoenaed to appear did not occur when he was scheduled to work. Cote felt it was within his responsibilities to evaluate the need for the presence of any of his officers at a hearing and that this could be done "on a case by case basis." Cote testified that he would have instituted disciplinary proceedings against Donovan had Donovan issued a subpoena to a witness to appear before this Board; however, he would not have objected had Donovan caused the subpoena to be issued by a third party justice of the peace.

FINDINGS OF FACT

1. Daniel Donovan was employed by the S.P.D. in June of 1975 and promoted to Sergeant in October of 1982.
2. Until he was transferred to a patrol sergeant position in April of 1991, Donovan was acting as court liaison officer, supervisor of computer activity, and equipment issuing officer.
3. Donovan has been active in and officer of the Somersworth Police Association for more than ten years, serving as the alternate of the Executive Board effective August 8, 1990.
4. Donovan has been active in (although he has not solicited) representing bargaining unit members in grievance proceedings and administrative matters in his capacity as a union member and officer.
5. The collective bargaining agreement in effect between the parties for all times pertinent to these proceedings provides:
 - a) Article 4.4: The City or its agents shall not discriminate against any person with respect toAssociation Membership or activities.....
 - b) Article 4.5: All lawful Association activities that directly and clearly relate to this Agreement are protected hereunder....
 - c) Article 6.3 (B): The employee when discussing his dispute, may be accompanied by an official of the Association...if he so desires.
6. Donovan engaged in activities to assist officers Winter and Williams as set forth herein on the dates indicated above.
7. Cote spoke to Donovan on or about March 8, 1991, stating that Cote's disapproval of Donovan's representing subordinate members of the department in grievance proceedings and administrative matters; however, Cote did not order Donovan to cease this practice.
8. On or about April 16, 1991 Donovan issued a subpoena and the requisite witness fee to Perreault for attendance at an administrative proceeding involving Williams, said subpoena being for a time when Perreault was not scheduled to work. Perreault did not comply with that subpoena.
9. On or about April 29, 1991, Cote wrote to Donovan directing him to "refrain from using a subpoena on department personnel

for administrative hearings" and threatening disciplinary proceedings if he did so.

10. Donovan responded to Cote's April 29, 1991 letter by asking that it be rescinded and removed from his file. By letter of May 16, 1991, Cote denied that request.
11. Discussions concerning departmental reorganization date to January 14, 1991, or earlier. Details of the reorganization were discussed between Cote and the City Manager and reflected in Cote's correspondence with him on February 8, 1991 and March 25, 1991, respectively.
12. There were sound, practical and rational reasons for establishing a fourth patrol sergeant position and for wanting senior supervision available for each patrol shift. Said reasons predated any discussion or expressions of concern from Cote to Donovan, as recited herein.
13. The foregoing conduct with respect to the Cote letter of April 29, 1991, to Donovan and to Cote's refusal to rescind and withdraw that letter from Cote's personnel file on or about May 16, 1991, constitutes conduct violative of and prohibited by RSA 273-A:5 (I) (a), (c) and (h) for which the remedy will be set forth below.
14. The implementation of departmental reorganization was violative of no portion of RSA 273-A:5 and all allegations asserting same are dismissed.

ORDER

The employer and its agents are directed forthwith:

1. To cease and desist from limiting or attempting to limit Donovan in exercising his authority as a Justice of the Peace to obtain or issue subpoenas for union business in grievance proceedings or administrative matters.
2. To cease and desist from informing or communicating to Donovan its dissatisfaction with his representing or assisting bargaining unit personnel in grievance proceedings or administrative matters.
3. To rescind Cote's letter of April 29, 1991, to Donovan and to remove same and all references thereto from Donovan's personnel file.

So ordered.

Signed this 9th day of December, 1991.


JACK BUCKLEY, ALTERNATE CHAIRMAN

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.